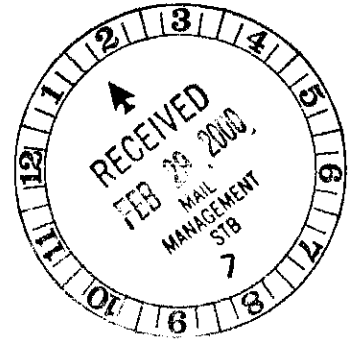


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Summary of Statement of
Consumers United for Rail Equity

On
Major Rail Consolidations and
The Present and Future Structure of the
North American Rail Industry

Before the
Surface Transportation Board

STB Ex Parte No. 582

February 29, 2000

I. Introduction

- A. C.U.R.E. is a coalition of electric utilities (public power generators, rural electric cooperatives and investor-owned electric utilities), coal producers and chemical and petrochemical companies that rely on rail transportation but are sometimes "captive" to a single railroad for at least some of their rail movements. C.U.R.E. advocates federal policies that will promote competition and increase efficiencies in the rail industry. Our membership list is attached.
- B. In the context of the proposed Burlington Northern Santa Fe/Canadian National merger, C.U.R.E. expresses the following concerns:
 - 1. That the proposed BNSF/CN merger creates the need for the STB to strengthen current merger policy;
 - 2. That without appropriate safeguards, the proposed BNSF/CN merger will exacerbate the anti-competitive trend in the national railroad system; and
 - 3. That the proposed BNSF/CN merger underscores the need to reverse the Board's 1996 "bottleneck" decision and rule regarding "competitive access."

II Congress and Stakeholders have expressed longstanding concern over the lack of effective competition in the rail industry.

- A. Congress has longstanding concerns about the lack of competition in the rail industry.
 - 1. In 1988, the Senate Commerce Committee narrowly voted against reporting the Interstate Commerce Revisions Act. Following that vote 14 Senators on that committee sent a letter to Interstate Commerce Committee (ICC) Chairman Heather Gradison which identified several concerns that, more than ten years later, remain relevant to the current rail policy debate:
 - a. the need to "assure that the captive shipper rate reasonableness process is not so complex, costly and time consuming that it fails to provide the protection intended by Congress;" and
 - b. the need to "assure that the Commission is discharging its responsibility to preserve and provide competitive railroad transportation alternatives."

- A. Since that time, however, the number of "competitive railroad transportation alternatives" available to shippers has declined.
 - 1. Over the past two decades, there has been a dramatic consolidation in the railroad industry leaving two major carriers in the West and two major carriers in the East. These four carriers handle 90 percent of rail traffic in North America. This development, together with several decisions by the Board, has led to a reduction in competitive options for railroad customers.
- B. The concerns articulated by 14 Senate Commerce Committee members remain valid today. Captive shippers remain trapped by a federal framework that does nothing to increase competition or expand transportation options.

III. Current Surface Transportation Board (STB) merger policy is inadequate to protect the public interest.

- A. The STB's current merger policy adheres to a public interest standard. That is, the Board is directed to approve mergers that are consistent with the public interest. Within this public interest determination, the Board must consider, among other factors: (i) the effect of the proposed transaction on the adequacy of transportation to the public; (ii) the effect of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (iii) the total fixed charges that would result from the proposed transaction; (iv) the interests of carrier employees affected by the transaction; and (v) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.^{1/}
- B. C.U.R.E. believes that, contrary to Congress' intent in giving the Board the exclusive authority to approve rail mergers, the Board's current merger policy has worked to reduce the transportation options available to rail shippers.

^{1/} In making its public interest determination, the Board performs a balancing test and weighs the benefits to the applicants and the public against any potential harm to the public. The Board also considers whether the claimed benefits could be realized by other means that would result in less potential harm to the public. The Board's regulations identify two types of potential harm: reduction of competition and harm to essential service. The regulations state: "If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not in itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest."

IV. The public interest is best served by an STB policy that requires mergers to increase competition and improve efficiencies in the marketplace.

- A. As the rail industry continues to contract, the risk of harm to effective competition increases. To counter this risk to competition, the STB should consider the following standards by which to review mergers:
1. require merging railroads to demonstrate that an increase in competitive options will be available to shippers after the merger;
 2. provide that no merger shall occur that would reduce the transportation alternatives available to any current railroad customer; and
 3. deny any proposed merger that does not provide more transportation options for railroad customers and improved service to all customers.^{2/}

V. STB can have the most positive impact on competition by reversing its bottleneck policy.

- A. Current shipper concerns are not focused on the rate reasonableness process.
1. Rail shippers no longer are interested in engaging in the process because it is too difficult, costly and time consuming to use.
 2. A Government Accounting Office (GAO) report released March 5, 1999 found that the rate reasonableness process is still too "complex, costly and time consuming" to be useful to most captive shippers.
 3. The process doesn't work well in a competitive, time sensitive marketplace.
- B. And while the public would benefit from stricter scrutiny over proposed mergers, such scrutiny would probably be a matter of "too little too late." In order to promote competition and ensure the long term health of the rail industry, STB must revisit two decisions: the bottleneck decision in Central Power & Light Co. v. Southern Pac. Trans. Co., Docket Nos. 41242 et al., STB Decision of December

^{2/} The STB has the existing authority to apply these additional requirements to mergers. The Board's regulations explicitly recognize that "[t]he Board has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anticompetitive effects of a consolidation."

27 1996, clarified, STB Decision of April 28, 1997;^{3/} and its competitive access rulemaking.

- C. By holding that bottleneck carriers are under no obligation to quote a rate of the bottleneck segment of a route if the rail carrier can provide single-line or inter-line service for the entire movement, the STB's "bottleneck" decision is the single biggest factor preventing effective competition in the rail industry today. Major railroads are not making contract rates available on these competitive segments, and rail shippers are left with the unattractive option of either initiating a competitive access case or bringing a rate reasonableness challenge for the entire movement. Thus, the bottleneck decisions give the railroads the best of both worlds, allowing them to escape both market competition and agency regulation.
- D. As a condition to this merger, and as new STB policy, railroads must be required to quote bottleneck rates. In view of the declining competitive options available to rail customers for transportation service, it is time for the Board to change its decision in the bottleneck cases.

VI. Conclusion

- A. As evidenced by the 1988 letter, the rail shipper community has been seeking redress to its competitiveness concerns for a very long time.
- B. Since 1988, the situation for rail shippers has only worsened.
 - 1. As a result of the rapid consolidation of the railroad industry, the number of transportation options available to rail shippers has declined substantially.
 - 2. Instead of alleviating the competitive problems largely brought about by this consolidation, the Board has exacerbated the situation for rail shippers with its rulings in the bottleneck cases.
- C. The proposed BNSF-CN merger, as well as any future rail consolidation

^{3/} The Board's decision was affirmed by the United States Court of Appeals for the Eight Circuit in MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999). The court held that: "[R]equiring carriers to provide challengeable rates on bottlenecks would prevent them from exploiting bottlenecks and charging rates up to [stand-alone cost] for complete origin-to-destination service. In the [STB's] view, this would impede the industry's efforts to achieve revenue adequacy, which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system. The [STB] therefore properly . . . held that carriers are not required to provide separately challengeable bottleneck rates."

activities, present the Board with an enormous opportunity to enhance rail competition and to address long-standing shipper concerns regarding rate reasonableness and quality of service.

- D. In conclusion, we call on the Board to modify its merger policy to protect and enhance competition; to revisit and reverse the "bottleneck" decision; and to recommend to Congress changes in the law that are necessary to provide this degree of competition in the rail industry.

Thank you for the opportunity to share our views with you on these important issues.